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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

UNITED STATES OF AMERICA,
RESPONDENT,

vs.

RAYMOND CUTTER
AND
ANNA SIZEMORE,
PETITIONERS.

ON WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in ruling that minor children have the authority to consent to a search of the bedroom occupied by their mother and the man with whom she and the children are living?

2. Did the Court of Appeals err in basing its decision to uphold a residential search warrant on information known to the affiant but never revealed to the issuing magistrate?

3. Did Defendants waive their contention that the warrant contained deliberate and material misrepresentations of fact by failing to object to a magistrate's recommendation that the fruits of the warrant be suppresed on other grounds, when no portion of that recommendation was adopted by the Trial Court?

4. Should a search warrant be invalidated by the affiant's admittedly deliberate deception of the issuing Magistrate concerning the identity and number of sources of his information?

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PETITION FOR CERTIORARI

JURSIDICTIONAL STATEMENT

This case is before the Court on a Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. Petitioners seek review of the judgment of the Court of Appeals filed on September 18, 1990 under case numbers 89-5390 and 89-5391, which were consolidated for appeal. (Appendix No. 4) A petition for rehearing and for rehearing *en banc* was denied in an order dated November 2, 1990. (Appendix No. 5)

Petitioners assert that this Court has discretionary authority to review any final judgment of a federal court of appeals in a

criminal matter. 28 U.S.C.A. 1201 *et seq.* Further, Petitioners assert that jurisdiction is proper in the instant case because it involves important questions of federal constitutional law which have not been, but should be, decided by this Court. Sup. Ct. Rule 17(c).

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This matter came before the United States Court of Appeals for the Sixth Circuit on appeal from the judgment of the United States District Court for the Eastern District of Kentucky at Covington. Defendants, Raymond Clutter and Anna Sizemore entered conditional pleas to a single count indictment charging them with possession with intent to distribute approximately 28.25 pounds of marijuana, under case number 87-74. 21 U.S.C.A. 841(a)(1). Prior to their conviction, Defendants filed a motion to suppress the evidence seized from their residence, which was the substance of this charge, citing lack of valid consent and deliberate misstatements of material fact. This motion was referred to a United States magistrate for evidentiary hearing and report and recommendation. The hearing on Defendants' motion revealed the following facts:

Defendants Clutter and Sizemore, at the time of the events which led to the search and seizure complained of in the motion to suppress, were residing together at 40 Maple Avenue. Also staying at that residence were Defendant Sizemore's three children by a previous marriage to Frank Sizemore. Defendant Sizemore and her ex-husband had undergone an extremely bitter divorce proceeding which resulted in her obtaining custody of the children and Mr. Sizemore being ordered not to set foot on the property located at 40 Maple Avenue.

Sometime during the fall of 1987, Mr. Sizemore contacted Agent Hal Spaw of the Northern Kentucky Narcotics Unit concerning allegations that there were large amounts of marijuana in the residence at 40 Maple Avenue. Sizemore refused to sign an affidavit or to permit his children to sign an affidavit for a search warrant of the residence. He was informed by the agent that if he or the children would not sign a warrant, the agent would have to gain entrance to the house and see the drugs himself to obtain a search warrant. The agent knew that Mr. Sizemore did not have the authority to admit him personally. Mr. Sizemore informed the officer

that he would arrange to have the children admit him when Defendants were not present. He then picked up his youngest child to prevent her from informing her mother that the police were at the house and instructed his 12 and 14 year old sons to admit Agent Spaw and show him the marijuana.

Agent Spaw responded to 40 Maple Avenue and told the children that he was the police officer they were supposed to admit and show the marijuana to. A search of the Defendants' dresser revealed marijuana. Agent Spaw knew the children did not have their parent's permission to admit him. In fact, he was afraid they would be endangered by their acts if the parents knew of them.

Agent Spaw then discussed the matter with his supervisor, Agent Berscheit, and determined that, to avoid mentioning the children's involvement, they would use Agent Berscheit as the affiant, listing the information received from Agent Spaw as coming from a confidential and reliable informant. Agent Spaw drafted an affidavit in this fashion which was then sworn to and signed by Agent Berscheit. Agent Berscheit admitted that the information misled the magistrate since the affidavit referred both to information received from Agent Spaw and from a confidential and reliable informant. Execution of that warrant led to seizure of all of the evidence whose admissibility was questioned by Defendants' motion.

On August 26, 1988, the referee returned a report and recommendation that the motion of Defendants to suppress items seized from their residence be granted, based on the lack of the valid consent for the initial search.

An objection to the magistrate's report and recommendation was filed by the United States Attorney. The trial court requested supplemental briefing directed to the applicability of the *Leon* decision to the facts of this case. On January 4, 1989, the Court sustained the objections of the United States Attorney to the magistrate's report and recommendation. Defendants' motion to suppress was denied. Defendants then moved the Court to enter a conditional plea permitting them

to resolve the search and seizure issue on appeal after entering their pleas. Defendants' motion for conditional plea was granted and Defendants entered pleas of guilty to the single count in the indictment. Defendants were sentenced to a term of 24 months imprisonment, a fine of $5,000.00 and a special assessment of $50.00. Execution of the sentence was stayed pending appeal.

On September 18, 1990, the Sixth Circuit issued an opinion affirming Defendants convictions. The Court specifically declined to base its decision on *Leon*, and returned to the original arguments presented to the magistrate. It concluded that the original entry was valid in that the officer had consent of the parties' minor children. The opinion also cites as an alternative theory the government's right to rely on the marijuana allegedly given to their father by the children as proof that drug activities were going on in the residence. This evidence was never mentioned to the issuing magistrate, and formed no part of the basis for issuance of the warrant in question.

The Sixth Circuit also rejected Defendant's contention that the issuing magistrate was deliberately misled as to material facts by the affiant officer. It ruled that Defendants waived the right to present this argument by failing to object to the magistrate's recommendation that Defendants' motion be granted on other grounds. In the alternative, it found the affiant's misstatements either not material or not intended to deceive.

From this judgment, Defendants now seek relief in this Court.

ARGUMENT

FIRST QUESTION PRESENTED FOR REVIEW:

Did the Court of Appeals err in ruling that minor children have the authority to consent to a search of the bedroom occupied by their mother and the man with whom she and the children are living?

While it is now firmly established in law that, under certain circumstances, a third party may consent to search of property owned or occupied by another, the Courts have established strict standards for viability of such consent. Although the right to be free from unreasonable searches can be waived, even at times by a third party, "courts indulge every reasonable presumption against waiver." *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). No bright line rule has been established by the courts which would automatically control the right to consent to search by a third party. This court has ruled that each case must be examined on its individual facts. The standards for such an examination were set out in *United States* v. *Matlack*, 415 U.S. 165 (1974).

Matlack indicates that the proper standard for determining whether a party has the right to consent to a search does not focus on property interests. To the contrary, common authority over the property or mutual use by persons having joint access or control over the property is the key. Furthermore, the Government bears the burden of establishing the requisite degree of authority and control to justify a search. A police officer may not simply assume that a third party has authority to consent to a search and avoid constitutional infirmity by carefully failing to inquire whether such authority does, in fact, exist.

A number of jurisdictions have ruled that minor children do not have the authority to consent to searches of the parental home. *See People* v. *Jennings*, 298 P.2d 56 (Cal. App. 1956); *Hembree* v. *State*, 546 S.W. 2d 235 (Tenn. Crim. 1976); *Commonwealth* v. *Garcia*, 478 P.2d 406 (1978); *May*

v. *State*, 199 S.2d 635 (Miss. 1967); *State* v. *Malcom*, 58 Del. 1; *Murphy* v. *State*, 353 S.2d 1153 (Ala. App. 1978). As a Florida Court noted: "(A) Sixteen year old child does not share 'common authority' with his father over the premises of a common dwelling place provided by the latter." *Padron* v. *State*, 328 S.2d 216 (Fla. Ct. App. 1976), *cert. denied*, 339 So. 2d 1172 (Fla. 1976).

Other courts in addressing this question have refused to make a bright line rule that all consents by minor children are automatically invalid. They have addressed these cases on an individual basis applying the *Matlack* standard as they would to consent of any other relative or inhabitant of the household. In those cases, the age of the child and the circumstances surrounding the alleged consent are closely scrutinized, however, to insure that consent is, in fact, voluntary and that the child does have the requisite joint authority over the places searched or items to be seized. Even where a joint occupant, such as a minor child, spouse or roommate, has joint access to the common areas of the residence, courts have almost uniformly recognized that such authority does not extend to a search of the private effects of another. In the instant case, the search involved a dresser in the bedroom of the children's mother and her roommate. Clearly, this is a private area in which Defendant's minor children do not have equal access and control. Nor is it reasonable for the officer to assume that children this young have authority to invite others to rummage through Defendant's personal possessions. A number of federal courts have suppressed evidence seized from the bedrooms, closets or dressers of defendants under the alleged authority of a third party.

In *United States* v. *Orejuela-Guenara*, 659 F. Supp. 882 (EDNY 1987), the District Court determined that a roommate and co-inhabitant of an apartment had no authority to consent to a search of the other occupant's closet, even though he undeniably had access to the other occupant's bedroom. In *United States* v. *Block*, 590 F.2d 535 (4th Cir. 1978), the Circuit Court ruled that a mother had no authority to consent to

a search of her son's footlocker, located in his bedroom, even though she was the owner and co-tenant of the residence. The fourth Circuit reached a similar conclusion in *Reeves* v. *Warden*, 346 F.2d 915 (4th Cir. 1965), concerning a mother's consent to search her son's dresser drawer. In *Cunningham* v. *Heinze*, 352 F.2d 1 (9th Cir. 1965), the Circuit Court determined that a landlady with access to Defendant's apartment for cleaning purposes had no authority to consent to a search of Defendant's bedroom and closet. Finally, in *United States* v. *Reeves*, 730 F.2d 1189 (CA Ark. 1984), the Court rejected a search of Defendant's office, conducted with his wife's consent, when there was no evidence that she had joint control or authority.

The issue presented here has apparently not been addressed by this Court, and has been the subject of much confusion in lower courts.

In the instant case, the Government's position is further weakened by the age of the third parties involved, and the circumstances under which their consent was obtained. Certainly the police officer had no right to assume that 12 and 14 year old children were permitted to admit strangers to the parental home at will. In fact, the police officer made no such unsupported assumption. Agent Spaw testified that he knew, at the time of his entrance to the house, that the children did not have their parents' permission to permit his entry and that the parents, in fact, would have instructed them not to do so.

Furthermore, the officer knew that admitting him to the house was not an independent decision by the children. In fact, he and Mr. Sizemore had discussed in detail a means to get him into the house. He knew that Mr. Sizemore was going to instruct the children to let him in. He knew that Mr. Sizemore could not authorize his entrance. Therefore, the officer knew that actual consent to search the house was coming, not from the children, who might have some questionable authority to offer it, but from the children's father,

who had no such authority and had been ordered not to set foot on the property.

Under these circumstances, and exercising every presumption against a valid waiver, the Court cannot maintain that consent was freely and knowingly given. Two young boys were instructed by their father, who was working in conjunction with the police officer, to admit the police officer to search the residence. A third child, who was not involved in this scheme, was removed from the residence by the father so that she would be unable to notify Defendants that a stranger was being permitted to search their bedroom. Furthermore, the father, who was ordering the children to consent to this search, had no authority to admit anyone to the premises. He had no authority to even enter the home himself.

SECOND QUESTION PRESENTED FOR REVIEW:

Did the Court of Appeals err in basing its decision to uphold a residential search warrant on information known to the affiant but never revealed to the issuing magistrate?

The District Court suggested in its opinion and order that evidence seized pursuant to the search warrant should not be excluded because "Officer Spaw had abundant probable cause to seek the warrant. His subterfuge with regard to entry was not necessary since he could have sought the warrant based solely on the reports to him by the father of the children. The actual facts presented a stronger case for probable cause in the eyes of the Court than did the facts stated in the affidavit."

The Sixth Circuit apparently credited this argument, because it cited the "earlier private search by the boys" as "an alternative theory upon which the district court should be affirmed." (Opinion of 6th Cir. pp. 8, 6) The Court's reliance on the evidence allegedly produced by this private search as an independent ground for upholding the search warrant is misplaced.

In the instant case, Agent Spaw revealed none of this information to the magistrate who issued the warrant. In determining whether a search warrant affidavit supplies probable cause for the issuance of the warrant, the Court may not go beyond the four corners of the affidavit. Information known to Agent Spaw and not supplied to the magistrate does not establish good faith on the part of Agent Spaw. In fact, as discussed extensively in the Fourth Issue Presented for Review, the act of concealing information from the magistrate itself militates against a finding of good faith reliance on the warrant.

THIRD QUESTION PRESENTED FOR REVIEW:

Did Defendants waive their contention that the warrant contained deliberate and material misrepresentations of fact by failing to object to a magistrate's recommendation that the fruits of the warrant be suppressed on other grounds, when no portion of that recommendation was adopted by the Trial Court?

The panel cites *Thomas* v. *Arn*, 474 U.S. 140 (1985), and *United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1981), for the proposition that failure to timely object to the report of a magistrate waives the right to appeal. That proposition, as set forth in these cases, has no application to the case at bar. In each case, and in those which have since relied on their authority, Defendant failed to object to recommendations which were unfavorable to his position, and those recommendations were subsequently adopted by the District Court. Under such circumstances, this Court ruled that the Sixth Circuit could, by administrative rule, preclude appeal, if proper notice was given in advance. Neither the plain language, or the rationale, of these decisions justify preclusion when the Trial Court rejects the report of the magistrate, and renders a *de novo* judgment, on legal grounds never even considered by the magistrate.

This Court summarized its decision in *Thomas* as follows:

> We hold that a court of appeals may adopt a rule conditioning appeal, *when taken from a district court judgment that adopts a magistrate's recommendation*, upon the filing of objections with the district court identifying those issues on which further review is desired.

Thomas at 155.

The Sixth Circuit recognized, in *Walters*, several reasons for precluding appeal when no objections are filed. Judicial economy, and a preference for permitting full review by the district court before subjecting its decisions to appellate

review were cited. In cases where those purposes are not served by strict adherence to the rule, the Court has excused procedural default, recognizing that Defendants should not be deprived of appellate rights for hypertechnical reasons. In *Patterson* v. *Minitzes*, 717 F.2d 284 (6th Cir. 1983), for example, this Court found no waiver where written objections were tendered after expiration of the ten-day period, but were, nevertheless, considered by the court:

> . . . when written objections to a magistrate's report are tendered beyond the 10 day period of 28 U.S.C. 636(b)(1), but are nevertheless filed and considered by the district court, the criteria identified in *Walters* in justification of the waiver rule promulgated therein dissipate and the rule will not apply to bar appellate review.

Patterson at 286.

In the case at bar, the district court was not precluded from reviewing the magistrate's recommendations by any failure to file objections. Objections were filed by the Government, necessitating *de novo* review. There can be no doubt that the court conducted such review. Nowhere in its opinion does the court adopt, or approve, any finding of the magistrate, factual or legal. In fact, the court chose to require briefing of an issue not even considered by the magistrate, and to base its opinion on that issue. Defendants cannot be said to have ambushed the court by appealing its judgment without prior objection to a magistrate's report which formed no part of the basis for that judgment.

It is also difficult to see how judicial economy would be served by the panel's requirement that a party file objections to the recommendations of the magistrate, when those recommendations are in his favor. If the magistrate had been considering two separate motions, or issues, and his decision had been split, one in favor and one not, some purpose would be served by requiring each party to object to the aspect of the decision unfavorable to it. That is not the situation before the

panel here. The magistrate's sole function was to recommend a ruling on Defendant's motion to suppress. He recommended that the motion be granted. It would be a greater waste of time and effort to require Defendants to object to this favorable recommendation simply because they did not agree with every aspect of the magistrate's legal reasoning.

In sum, *Thomas* and *Walters* authorize a rule foreclosing appeal of a judgment adopting the report of a magistrate where no objections were filed within ten days of the filing of the report. They have no application to a case where the report of the magistrate was not adopted, and was, in fact, objected to by the appropriate party. No legitimate rationale exists for extending these decisions so far beyond their intended scope, since the magistrate's recommendations form no part of the basis for the judgment appealed from. The ruling by the panel that Defendants are precluded from contesting the warrant based on the officer's misleading statements to the magistrate is, therefore, incorrect. Since denial of Defendants' rights to direct appeal is a question of exceptional importance, and the decision of the panel conflicts with the plain language of *Thomas*, as well as the intention of *Thomas* and *Walters*, this Court should grant Defendants' petition for certiorari and authoritatively resolve this issue.

FOURTH QUESTION PRESENTED FOR REVIEW:

Should a search warrant be invalidated by the affiant's admittedly deliberate deception of the issuing magistrate concerning the identity and number of sources of his information?

The fourth issue presented for review by this Court involves the validity of the second search of Defendant's residence conducted pursuant to a search warrant obtained by Agent Berscheit. In addition to the use of illegally obtained evidence to persuade the magistrate to issue the warrant, Defendant contends that the affiant made deliberate misstatements and omissions of fact which were material to the magistrate's finding of probable cause. This portion of the argument addresses those intentional misstatements and omissions.

The judge failed to address the question of misstatements in the affidavit in any depth. The only reference made to this question in the District Court's opinion and order is as follows:

> "They (the officers) misstated the facts to the state judge only to protect the children, not to enhance the probable cause. In fact, as I have said above, the actual probable cause was stronger than the misstated facts."

Defendant contends that the District Court, because of its misapplication of *Leon* to the instant facts, failed to give proper consideration to the misstatements or omissions in the affidavit. The Sixth Circuit similarly emphasized the officer's motives to the exclusions of the true legal issue.

Defendants' right to challenge the veracity of allegations made in the search warrant affidavit was established by this Court in *Franks* v. *Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed. 2d 667 (1978). As the court noted, "The requirement that a warrant not issue 'but upon probable cause, supported by oath or affirmation' would be reduced to a nullity if a police officer was able to use deliberately falsified allegations

to demonstrate probable cause, and, having misled the magistrate; then was able to remain confident that the ploy was worthwhile." Defendants contend that the reference to Agent Spaw as a confidential and reliable informant by the affiant, as well as a separate mention of a check with Agent Spaw concerning complaints against Mr. Clutter in the same affidavit is, in and of itself, an intentional misstatement. Agent Spaw was clearly not a confidential and reliable informant as that term is generally understood by the Courts. Furthermore, affiant admitted at the hearing on the motion to suppress that the wording of the search warrant affidavit would have misled any reasonable person:

> Q. If you were a judge looking at this affidavit, you would believe that there were two people involved, a confidential informant, number one, and Hal Spaw, number two, as an independent witness; correct?
>
> A. Yes, Sir.

Furthermore, it makes no difference whether the wording of the affidavit is characterized as deliberate misstatement or deliberate omission of material fact. Every court which has addressed this question has agreed that deliberate omissions of material facts as well as deliberate misstatements of fact are covered by the *Franks* decision.

There can be no doubt that the misstatement or omission in the instant case was deliberate. Agent Spaw and Agent Berscheit testified that they consulted together for approximately an hour before drafting the search warrant affidavit and obtaining the magistrate's signature. That discussion revolved around a means to conceal from the magistrate the actual source of information obtained by Agent Spaw. Furthermore, Agent Berscheit, who was the affiant, testified that he understood that the effect of the affidavit was to mislead the magistrate.

A finding of intentional or reckless falsehood does not require a finding that the officers knew their actions were im-

proper or that they understood that the omission or falsehood was material to the magistrate's determination of probable cause. The officers may well have believed that the drafting of this affidavit was simply an artful way to avoid problems posed by the use of small children against their parents in the instant case.

Agent Spaw may have believed that he acted correctly in entering the Defendants' house on the previous night and obtaining the information which led to the issuance of this warrant. Therefore, he might have felt that deliberately concealing the facts of his prior search from the magistrate would not materially affect the magistrate's decision. However, it is not the police officer's job to make these determinations in place of a magistrate. The magistrate is not entitled or intended to rely on the judgment of officers in the field in making the determination that probable cause exists. The magistrate is required to independently review the evidence and make a detached decision as to the reasonableness of the requested search. Such a decision cannot be made when police officers deliberately withhold material information from the magistrate.

The characterization of Agent Spaw as a confidential and reliable informant left the magistrate with the impression that any entry into Defendant's home had been made by a private citizen. Such an entry does not trigger the constitutional questions raised by a police officer's actions. Therefore, the magistrate was forestalled from making an inquiry into the source of the information and the officer's authority for entering Defendant's home. Without such an inquiry, the magistrate could not make a rational decision concerning the existence of probable cause independent of any illegally obtained information. Furthermore, the magistrate was led to believe that affiant had two separate sources of information connecting at least one Defendant with controlled substances. Since the affidavit makes reference to information received from a confidential informant and to information received from Agent Spaw, the magistrate could only infer that affiant

had two separate sources of information. Again, the existence or non-existence of independent corroboration is material to the magistrate's determination of probable cause.

Excising the misleading and illegally obtained information from the warrant affidavit, it is clear that the remaining information is not sufficient to support a search of Defendants' residence. The only independent corroboration of the "confidential informant" information is the allegation that Agent Spaw has received at least two complaints about Mr. Clutter dealing in marijuana in the past. No source is given for those complaints, nor is there any information provided which would permit the magistrate to make a determination of the reliability of this information. Furthermore, there is nothing to connect those anonymous complaints with the residence at 40 Maple Avenue. In fact, at the hearing on the motion to suppress, Agent Spaw admitted that the two anonymous complaints did not contain any mention of the Maple Avenue residence. This information could not, by any stretch of the imagination, support a finding of probable cause to search the residence at 40 Maple Avenue. Good faith reliance on the warrant is not available in these circumstances, as the Sixth Circuit noted in *United States* v. *Savoca*, 761 F.2d 292 (6th Cir. 1985), *cert. denied* 474 U.S. 852 (1985). Therefore, the warrant in question cannot be rehabilitated and all evidence seized pursuant thereto must be suppressed.

CONCLUSION

Defendants' Petition raises serious issues of Constitutional and Federal law, which have not been authoritatively resolved by this Court. Petitioners respectfully submit that the Court should grant certiorari to clarify these matters for the lower courts.

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

Nos. 89-5390 & 89-5391

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RAYMOND CLUTTER (89-5390),
ANNA M. SIZEMORE (89-5391),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed September 18, 1990

Before: BOGGS and NORRIS, Circuit Judges; and EDWARDS, Senior Circuit Judge.

ALAN E. NORRIS, Circuit Judge. Defendants Raymond Clutter and Anna M. Sizemore appeal the district court's denial of their motion to suppress evidence of a large quantity of marijuana which they assert was seized pursuant to an invalid search warrant. The warrant is faulty, they contend, because its issuance was based upon information gained through an illegal search of their home, and the information given the issuing magistrate was misleading because it failed to apprise him of the method by which the information was obtained.

After conducting an evidentiary hearing, a magistrate concluded that the affidavit was not misleading, but recommended that the evidence nevertheless be suppressed because he concluded the warrant was based upon information obtained through an invalid consent search. The district court,

however, denied the motion, relying upon the "spirit" of the good faith exception of *United States* v. *Leon*, 468 U.S. 897 (1984). Defendants then entered a plea of guilty to the indictment charging them with possession of a controlled substance with intent to distribute, the plea being conditioned upon the outcome of this appeal.

BACKGROUND

Defendants Clutter and Sizemore resided together in Highland Heights, Kentucky, along with Sizemore's children from a previous marriage, Chris (age fourteen), Jim (age twelve), and Amy (age ten). Defendants routinely left the children alone from the time they left for work in the evening around 7:00 or 8:00 p.m., until they returned between 4:00 and 6:00 a.m. the next morning. In October 1987, Chris and Jim reported to their father, Frank Sizemore, that there was a "tremendous" amount of marijuana in defendants' home. Chris delivered to his father marijuana in a plastic bag which he had taken from defendants' bedroom. Frank Sizemore contacted Hal Spaw of the Northern Kentucky Narcotics Unit, and turned over to him the bag of marijuana. Sizemore advised Officer Spaw that the boys had told him that bags of marijuana were sitting around in defendants' bedroom and some of it was in dresser drawers.

Spaw suggested to Frank Sizemore that he might sign an affidavit for a search warrant, based upon the information given him by his sons. Sizemore declined, and would not consider the boys becoming openly involved, for fear of his safety and that of the boys. Sizemore said that defendants had on several occasions threatened to kill him.

In view of Frank Sizemore's having taken this position, Spaw told him that someone, perhaps an informant, would need to get inside defendants' residence in order to confirm the information given by the boys, if Spaw was to develop for a judge the information necessary to obtain a search warrant. Sizemore suggested that the boys would let Spaw into the house, and he telephoned them to arrange for a visit by

Spaw. When Officer Spaw went to defendants' home, knocked on the door, showed the boys his badge, and identified himself as the policeman they were expecting, they admitted him through the kitchen door. He immediately smelled marijuana. The boys led Spaw into defendants' bedroom and pointed out a dresser drawer as the location of marijuana. Spaw opened the drawer and saw sandwich-sized plastic bags containing marijuana. The boys then indicated there was more behind the dresser and, without moving any furniture, Spaw was able to see "two big garbage bags full of marijuana." He left without removing anything from the house.

Spaw prepared an affidavit to support an application for a search warrant for the signature of another police officer. In an effort to protect the boys, Spaw attributed his observations inside defendants' house to a confidential informant. The fact that the confidential informant was Spaw and that entry into the home was gained through the Sizemore children was not mentioned in the affidavit. A search warrant was issued, and officers found 28.25 pounds of marijuana in defendants' home.

DISCUSSION

As the district court acknowledged, the applicability of *United States* v. *Leon* to the facts of this case is not clear. However, we need not reach defendants' contention that the district court erred in that regard, since the court can be affirmed on other grounds. *Russ' Kwik Car Wash, Inc.* v. *Marathon Petroleum Co.*, 772 F.2d 214, 216 (6th Cir. 1985).

Defendants argue for the position taken by the magistrate, that the marijuana seized pursuant to the search warrant could not be introduced, since the warrant was predicated upon the fruits of a warrantless search. *See Murray* v. *United States*, 487 U.S. 533, 536 (1988). On the other hand, the government contends that Spaw's initial entry was lawful since it was pursuant to consent given by the Sizemore boys.

A search does not violate the Fourth Amendment where

police obtain consent to search from one who possesses common authority over the premises with the absent nonconsenting target of the search. *United States* v. *Matlock*, 415 U.S. 164, 169 (1974).

> [A] consent search is fundamentally different in nature from the waiver of a trial right. . . . [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

Id. at 171.

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id. at 171 n.7.

As a general consideration, there is every reason to suppose that mature family members possess the authority to admit police to look about the family residence, since in common experience family members have the run of the house. So, in that sense, absent special circumstances, all rooms in the residence can be said to be areas of usage common to all members of the family. It is, of course, conceivable that family members will exclude from this common authority access

to areas where they wish to maintain an expectation of privacy, even from other members of the family. Accordingly, courts are understandably reluctant to approve third-party consent searches of an enclosed space in which the family member targeted for the search has clearly manifested an expectation of exclusivity. *See, e.g., United States* v. *Block*, 590 F.2d 535 (4th Cir. 1978) (third-party consent search of secured footlocker ruled invalid). It should be noted, however, that the Supreme Court has resisted a strained application of such an exclusive control concept. *See Frazier* v. *Cupp*, 394 U.S. 731 (1969).

Under the circumstances of this case, where children twelve and fourteen years of age routinely were left in exclusive control of the house, and defendants' possession of large quantities of marijuana was so open and patently nonexclusive that its odor pervaded the house, the government satisfied its burden of demonstrating the initial warrantless search of the bedroom was by consent, since the boys enjoyed that degree of access and control over the house that afforded them the right to permit inspection of any room in the house, and defendants assumed that risk.[1] Whether they also had the authority to consent to Spaw's inspection of the bureau drawer is a closer question, but one we need not address, since the large amount of marijuana validly seized in the garbage bags was sufficient to support issuance of the search warrant (and the convictions).

Defendants further argue that the boys could not consent to the search, since Spaw knew that defendants would not have permitted the boys to allow him to see the marijuana. That argument confuses the idea of common authority to consent to a search, with actual authority given an agent by his principal, and could be used to invalidate nearly any consent to

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[1] Even if one were to argue that these facts would not warrant a finding that the government established that the boys had joint access or control for most purposes, the facts were more than adequate to support a reasonable belief by Spaw that the boys had authority to consent. *See Illinois* v. *Rodriguez*, ____ U.S. ____, 58 U.S.L.W. 4892 (decided June 21, 1990).

search given by a third party. The legitimate expectation of privacy required to defeat common authority to consent to a search is vastly different from a mere subjective expectation of not being discovered to have violated the law. *Rakas* v. *Illinois*, 439 U.S. 128, 143 n.12 (1978). Knowledge that defendants, like any other violators of the law, would not have wanted to be turned in to law enforcement authorities, is insufficient to defeat the reality that the boys possessed common authority over the premises.

Moreover, there is an alternative theory upon which the district court should be affirmed.

As pointed out by the government, defendants never challenged the right of the government to rely upon the bag of marijuana which the older boy previously had removed from their bedroom. That is understandable, since the exclusionary rule of the Fourth Amendment does not apply to a search and seizure by a private person not acting in collusion with law enforcement officials in order to circumvent the requirements of a search warrant. *United States* v. *Jacobsen*, 466 U.S. 109 (1984); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Burdeau* v. *McDowell*, 256 U.S. 465 (1921). A search, as contemplated by the Fourth Amendment, occurs when an expectation of privacy that society is prepared to consider reasonable is infringed by government action; but, the Fourth Amendment is wholly inapplicable to a search, even an unreasonable one, effected by a private individual not acting as an agent of the government. *Jacobsen*, 466 U.S. at 113. Ordinarily then, where a private person delivers the fruits of his private search to police, that evidence is not excludable at trial on the basis that is was procured without a search warrant. *Coolidge*, 403 U.S. at 487. That was, of course, the situation with the bag of marijuana brought to police in this case.

Police seldom obtain the fruits of private searches under such "silver platter" circumstances. In *Coolidge*, police went to the defendant's house to question his wife about a murder in which he was a suspect. When she was asked if he had a gun, she gave his guns to the police; when asked what he

wore on the night of the murder, she gave them his clothes. The Supreme Court rejected defendant's contention that the result of police conduct was that his wife acted as the instrument or agent of the state when she produced the items he sought to exclude from evidence. Because she produced the items of her own accord, as an alternative to describing them, there was no unconstitutional police conduct to which Fourth Amendment considerations could attach. *Id.* at 489.

In *Jacobsen*, employees of a freight company examined a package which had been damaged by a fork lift. The wrapped cardboard carton was opened and seen to contain a tube made of duct tape — that tape was in turn cut open and the employees saw clear plastic bags containing white powder. They replaced the bags inside the tube, returned it to the box, and notified the Drug Enforcement Administration. When a DEA agent arrived, he was shown the box, which had its lid open. He saw that the tube inside had been slit open and proceeded to open the bags, remove a trace of the powder, and field test it for cocaine.

The Supreme Court noted that the fact that agents of the private carrier had independently opened the package and made an examination that might have been impermissible for a government employee did not render otherwise reasonable official conduct unreasonable. Even though the private conduct may have been unreasonable, it did not violate the Fourth Amendment because of its private character. 466 U.S. at 114-15. The question raised by the DEA agent's conduct, said the Court, was whether it amounted to an additional invasion of the defendant's privacy expectation beyond the scope of the private search. *Id.* at 116. Obviously, had the government agent's conduct significantly exceeded that of the freight company's employees, then he would have conducted a new and different search which would have been subject to Fourth Amendment protections. The Supreme Court concluded that there had been no impermissible expansion of the private search since, under the circumstances, the government had not infringed upon any constitutionally protected

private interest that had not already been frustrated by the private search. *Id.* at 118.

When the circumstances of the case before us are considered in the context of a private search, it becomes apparent that the marijuana found in defendants' bedroom was not subject to the exclusionary rule of the Fourth Amendment. It was upon the boys' initiative that the chain of events was set in motion. From the earlier private search by the boys, Spaw had already learned that marijuana was kept in defendants' bedroom in garbage bags and in dresser drawers. When he arrived at the house, the boys, like Mrs. Coolidge, voluntarily displayed to him the items he inquired about — he was taken to the bedroom where the garbage bags were pointed out in plain view and he was directed to the dresser drawer which contained marijuana.

And in a situation similar to that in *Jacobsen*, Spaw opened the drawer that had previously been opened in the boys' private search and saw what the private searchers told him they had seen. He learned nothing as the result of his own conduct that he had not already heard about as the result of the private search; rather than discovering anything new when he looked in the bedroom the boys had looked in and opened the drawer the boys had opened, he only confirmed the fruits of their private search. Accordingly, Spaw did not expand upon or exceed the scope of the private search and could not, therefore, have infringed upon any constitutionally protected privacy interest of the defendants which had not already been frustrated by the private search.

By failing to object timely to the magistrate's recommendation that the district court reject defendants' contention that the affidavit accompanying the application for the search warrant contained deliberate and material omissions of fact, defendants failed to preserve that contention. *Thomas* v. *Arn*, 474 U.S. 140 (1985); *United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1981). Furthermore, because the information upon which the search warrant was predicated was legally obtained, the omission from the affidavit of a specific description of the method by which it was obtained, cannot be said

to be a material omission. In addition, while the judge who issued the search warrant might have been misled into believing that Spaw and the confidential informant were two different persons, that misconception would not have been crucial to establishing probable cause. Defendants have not pointed to any facts recited in the affidavit relating to probable cause that are false. Accordingly, when one views the motivation of the police officers in drafting the affidavit in the form presented, it cannot be said that they acted to deceive the judge as to the existence of probable cause.

The judgments of the district court are **affirmed.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CRIMINAL ACTION NO. 87-74

UNITED STATES OF AMERICA
PLAINTIFF

VS.

RAYMOND CLUTTER AND ANNA MARIE SIZEMORE
DEFENDANTS

OPINION AND ORDER
(Filed January 4, 1989)

This matter is before the court on objections to the Report and Recommendation of the Magistrate, recommending that a motion to suppress the marijuana herein as admissible in evidence be granted.

The parties did not argue before the Magistrate the applicability of the good faith exception established in *United States* v. *Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984).

The court, believing that the *Leon* test might be applicable, ordered supplemental briefs filed by the parties. The court, upon considering these briefs, believes that the good faith exception is applicable and for that reason the motion to suppress must be denied.

FACTS

In November of 1987, defendants Anna Sizemore and Raymond Clutter resided together at 40 Maple Avenue in Highland Heights, Kentucky. Anna Sizemore was divorced from Frank Sizemore and Frank Sizemore had remarried. Frank and Anna Sizemore had three children: Chris, 14; Jim, 12; and Amy, 10. At the time of defendants' arrest, the

children lived with their mother, Anna Sizemore, at Raymond Clutter's house in Highland Heights.

Sometime in October of 1987, Chris and Jim Sizemore telephoned their father, Frank Sizemore, and told him that there was a large amount of marijuana in the Clutter house. Chris Sizemore took a small plastic bag of the marijuana to his father, who then gave it to Michael Zaden, a member of the State Public Defender Investigator's staff.

Sandy Sizemore, Frank Sizemore's second wife, called Hal Spaw, a state narcotics officer, in October of 1987 and told him about her stepchildren's information about marijuana in the Clutter house. Mike Zaden met Spaw on October 12, 1987 at Damon's Rib Restaurant in Florence and gave Spaw the bag of marijuana that Frank Sizemore had given him. Although Zaden did not reveal the source of his information, Spaw verified Zaden's integrity as a prior source of reliable information. Spaw took the bag to the Kentucky State Police Crime Lab, where it was confirmed that the substance was marijuana.

Spaw asked Frank Sizemore to sign an affidavit for issuance of a search warrant based on the information given by Chris and Jim Sizemore. Frank Sizemore refused, and refused to allow the children to sign similar affidavits. Sizemore testified that he refused to sign the affidavits because he was concerned for his own safety and the safety of his children. He stated that Anna and Ray Clutter had threatened on several occasions to kill him. He was also concerned that if Anna Sizemore and Ray Clutter found out that the children had informed the police about the marijuana, they would physically injure the children. Spaw suggested to Sizemore that neither Sizemore nor the children would need to be mentioned in an affidavit if Spaw himself could see the marijuana.

Spaw did not pursue the investigation for almost a month because he believed that Frank and Sandy Sizemore possessed no useable information and there were no other informants available to make a purchase. Sandy Sizemore called Spaw in early November of 1987 and met with him at the Ground

Round Restaurant in Florence. She asked if her husband might contact Spaw regarding the marijuana.

On November 11, 1987, Kenton County dispatch contacted Spaw with Sizemore's phone number. Spaw called Sizemore that evening. Sizemore again declined to serve as an informant or to sign an affidavit or allow his sons to sign an affidavit. Sizemore then told Spaw that Anna and Ray Clutter would be at work that evening, and he would tell his boys to let Spaw into Clutter's house to see the marijuana. Both Spaw and Frank Sizemore testified that this plan was Sizemore's idea, not Spaw's. Spaw testified that his November meeting with Sandy Sizemore corroborated information previously given by Zaden.

Later that night, Frank Sizemore telephoned his sons and told them that a police officer would come by the house to see the marijuana. Sizemore described Spaw, and told the children that they should let him in and show him where the marijuana was. Sizemore also told them that he would come by the house first to pick up his daughter, Amy, prior to Spaw's arrival. Sizemore drove to the Clutter house, but did not enter. He was forbidden by court order to enter the property because of his bitter divorce from Anna Sizemore. He picked up Amy and returned to his home. Sizemore stated that his reason for picking up his daughter was so that she would not tell her mother that the boys had allowed a police officer in the house while she was gone.

Sizemore then called Spaw to tell him that Anna and Ray Clutter had left for work, and that they would not be present at the house. He also told Spaw that he had told his sons to let Spaw in the house. Spaw then drove to the Clutter house and knocked on the side door near the kitchen. After showing the Sizemore boys his badge and identifying himself as a policeman, they admitted him to the house. Spaw testified that the smell of marijuana was apparent. Chris and Jim Sizemore led Spaw into the defendants' bedroom and pointed to a dresser drawer. Spaw opened the drawer and found several pounds of marijuana in bags. The boys also indicated that there was more marijuana behind the dresser. Without

moving the dresser, Spaw looked behind it and saw two large garbage bags filled with marijuana. Spaw then left the house without removing any of the marijuana.

The next day, Spaw prepared an affidavit for issuance of a search warrant. Spaw testified that in order to protect the identity of the Sizemore children, he drafted the affidavit with himself as the unnamed confidential informant and Agent Larry Berscheit as the affiant. Berscheit played no active role in the investigation until this time. Berscheit testified that, after discussing the case with Spaw, Spaw prepared the affidavit but Berscheit read it in its entirety and verified that the contents were accurate. The affidavit was worded as follows (affiant's wording in bold):

> Affiant further states that on the date and at the time of **11/12/87 9:30 a.m.** affiant received information from **a confidential and reliable informant, Hereafter referred to as C.I., who stated to the affiant that the C.I. was in the above described residence within the last 48 hours of 11/12/87 and while in the residence did observe a very large quantity of marihuana. The marihuana is bagged in clear plastic baggies and is kept in the bedroom. The C.I. is familiar with marihuana as C.I. has seen marihuana on numerous occasions and is familiar with packaging methods for street sales.**
>
> Acting on the information received, affiant conducted the following independent investigation: **The affiant checked with Hal Spaw Director of the Narcotics Unit and Hal Spaw stated that he has received complaints on Mr. Clutter dealing in marihuana on at least two occasions.**
>
> Affiant believes his informant to be reliable and truthful because **The C.I. has supplied to the affiant on at least three (3) occasions in the last four (4) months to the whereabouts of controlled substances including marihuana and on each occasion controlled substances were seized.**

In his testimony, Spaw qualified the last paragraph by stating that on the occasions referred to in that section, the complainants did not tell Spaw that they received marijuana from Clutter's residence. In his testimony, Berscheit agreed that the wording of the affidavit would mislead a judge looking at it into believing that "there were two people involved, a confidential informant, number one, and Hal Spaw, number two, as an independent witness."

The affidavit was included in an application for a search warrant and submitted to Campbell District Judge Neil Lewis on November 12, 1987. Judge Lewis issued the warrant, and it was executed at 11:32 a.m. on November 12 by Berscheit. Upon searching the residence, the police recovered approximately thirteen kilograms of marijuana.

On December 9, 1987, the grand jury for the Eastern District of Kentucky at Covington returned a one count indictment against Anna Sizemore and Raymond Clutter, charging them with possession with intent to distribute approximately 28.25 pounds of marijuana. On May 11, 1988 and May 27, 1988, defendants Clutter and Sizemore respectively filed motions to suppress the marijuana seized pursuant to the November 12, 1987 search warrant. The matter was referred to United States Magistrate J. Gregory Wehrman, and an evidentiary hearing was conducted on June 21, 1988. Magistrate Wehrman ruled that the marijuana was seized in violation of the defendants' Fourth Amendment rights and that it should, therefore, be suppressed. On September 1, 1988, the United States filed objections to the Report and Recommendation of the Magistrate. On September 12, 1988, the defendants filed a joint response to the United States' objections.

ANALYSIS

Whether the Officer Spaw's original entry into the defendants' home was illegal.

The United States argues that Officer Spaw had obtained the consent of a responsible occupant of the defendants' home

to enter and make the observations that were ultimately incorporated into the warrant.

As the opinion of the Magistrate on this issue reflects, this is a very close question. It turns upon a factual analysis of how responsible the teenager was and what the scope of his authority was vis a vis his parents. The court finds it unnecessary to rule on this question, however, becasue it finds the good faith exception to the exclusionary rule established by *United States* v. *Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984), to be applicable.

4 Applicability of United States v. Leon

Inasmuch as this case is well known, the court will not undertake a detailed statement of the facts thereof. The salient portions of the court's opinion in *Leon* are quite succinct:

> "We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment. 'No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect. . . .' *United States* v. *Janis*, 428 U.S. at 452, n. 22, 96 S.Ct. at 3031, n. 22. But even assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.
>
> * * *
>
> "In short, where the officer's conduct is objectively reasonable,
>
> > 'excluding the evidence will not further the ends of the exclusionary rule in any applicable way;

> for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.' *Stone* v. *Powell*, 428 U.S., at 539-540, 96 S.Ct. at 3073-3074 (WHITE, J., dissenting).
>
> "This is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. In most such cases, there is no police illegality and thus nothing to deter."

United States v. *Leon*, 104 S.Ct. at 3418-19.

As able counsel for the defendants point out, there are certain problems with the application of the *Leon* rule in the unique factual circumstances of this case. The principal problem is the fact that the warrant did not state the facts as above related because the officer was trying to protect the children living in the apartment from retaliation.

The court has concluded that the *Leon* exception is applicable, however, on the basis of the following considerations:

1. Officer Spaw had abundant probable cause to seek the warrant. His subterfuge with regard to entry was not necessary since he could have sought the warrant based solely on the reports to him by the father of the children. The actual facts presented a stronger case for probable cause in the eyes of the court than did the facts stated in the affidavit.

2. Assuming that the entry was necessary, the officer was in objective good faith in believing that his original entry onto the premises was legal. As stated above, this is a very close question. After two days of research, the answer is still not clear to me. I have refrained from ruling on it, although I tend to disagree with the Magistrate. The officer had to act in the field under field conditions.

Therefore, I am persuaded that the officers acted in good

faith under the circumstances. The Supreme Court has said concerning *Leon* that its purpose is to retain "the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment." 104 S.Ct. at 3419, n. 20.

Here, the officers did the best they could under difficult circumstances to comply with the Fourth Amendment. They had probable cause either on the basis of the father's statements, or on Spaw's entry and observation. They misstated the facts to the state judge only to protect the children, not to enhance the probable cause. In fact, as I have said above, the actual probable cause was stronger than the misstated facts. Therefore, the court holds that the spirit, if not the letter, of *Leon* is applicable and the good faith exception to the exclusionary rule denominated by *Leon* should apply. *Cf. United States* v. *Thomas*, 757 F.2d 1359 (2nd Cir. 1985); *United States* v. *Thornton*, 746 F.2d 39 (D.C. Cir. 1984).

Therefore, for the foregoing reasons,

IT IS ORDERED as follows:

1. That the objections of the United States to the Report and Recommendation of the Magistrate are hereby sustained;

2. That the motion to suppress be, and it is, hereby denied; and

3. That the trial date of TUESDAY, JANUARY 17, 1989 AT 10:00 A.M. shall remain as previously set.

This 4th day of January, 1989.

/s/ WILLIAM O. BERTELSMAN,
JUDGE

Copies:
U.S. Attorney
R. Scott Croswell
Harry P. Hellings, Jr.
U.S. Probation
1/4/89 — myh

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

ACTION NO: 84-74

UNITED STATES OF AMERICA
PLAINTIFF

VS.

RAYMOND CLUTTER and
ANN MARIE SIZEMORE
DEFENDANTS

REPORT AND RECOMMENDATION
(Filed August 26, 1988)

FRANK SIZEMORE

Frank Sizemore and his former wife, Anna Sizemore, are the parents of three children: Chris, 14; Jim, 12; and Amy, 10. During the time in question here, defendant Anna Sizemore and her children lived with the co-defendant, Raymond Clutter, at his residence on 40 Maple Avenue in Highland Heights, Kentucky. The two defendants were not married, but Frank Sizemore had remarried (Sandy) and resided on South Miller Avenue in Highland Heights.

Sometime in October or November of 1987, the Sizemore children told their father about the presence of a substantial amount of marijuana (pot) in the house at 40 Maple Avenue. On one occasion in October, Chris Sizemore took a bag of marijuana from the house to his father, who in turn gave it to Michael Zaden, a member of the State Publuc Defender Investigator's staff. Zaden then contacted by phone Hal Spaw, Northern Kentucky Narcotics Officer, and in a subsequent phone conversation between Frank Sizemore and Spaw, Sizemore detailed information from his children to the effect that there were garbage bags full of pot n the bedrooms and

dresser drawers at the Clutter residence. Sizemore voiced his concern to Agent Spaw for the safety of his children and himself in volunteering this information because both defendants had, on several occasions, threatened to kill him.

Spaw asked Frank Sizemore to sign an affidavit for issuance of a search warrant based upon the information given by the children, mainly the two boys. This witness refused Spaw's request because of his safety concerns. As an alternative, Spaw suggested that neither Sizemore nor his children need be mentioned in an affidavit if Spaw could personally view the marijuana. In direct examination by the government, Sizemore described the pre-arranged plan between himself and Spaw:

Transcript, p. 19.

Q . Okay. Now based on that, he said that, what happened, what took place next regarding the marijuana in the house as far as you were concern?

A. Well, he just said that if I would, if I would — if he could get in to see the pot that he could go in and make an arrest.

Q. And what happened?

A. Well, he told me to have — let's see, how was it? I called the kids and I says, boys, I said there will be somebody come over there and see the pot.

Q. Did Mr. Spaw tell you to do that?

A. No.

Q. Whose idea was that to do that?

A. That was mine.

On November 11, 1987, Sizemore told his sons by phone that Spaw (whom he physically described) would be arriving at the Clutter residence to see the pot, but that he (Sizemore) would pick up his daughter prior to his happening. Sizemore drove to the Clutter house but did not enter, and after returning home with his daughter Amy, he called Spaw to confirm

that no one other than his two sons were present. Within a couple of hours Spaw called Frank Sizemore back to verify that he had seen the marijuana and would obtain a search warrant "on the basis of an informant", in Sizemore's words.

On cross-examination Sizemore agreed that he and his former wife engaged in a bitter divorce as a result of which he was not permitted in or near the Clutter house, other than to pick up his children for visitation. Sizemore concurred with the following facts:

1. From his personal use of marijuana, he immediately recognized it in the sandwich-type bag given to him by his son, and he was the source of this information to Agent Spaw and not a confidential informant;
2. He worked in conjunction with Spaw to secure the necessary information for issuance of a search warrant, but Spaw was in charge of the investigation;
3. He had no ownership interest in the Clutter residence;
4. The timing of Spaw's entry was to avoid the presence of the defendants as well as their knowledge of the children's participation;
5. Sizemore did not wish his daughter, Amy, to be present because she would "rat on" her brothers to Anna Sizemore.

Sizemore concluded by testifying that the scheme to gain entrance into Clutter's house was his alone, and that he had no right, legal or otherwise, to authorize Spaw's entrance.

HAL SPAW

Spaw's first contact in this case was a phone call from Sandy Sizemore regarding her stepchildren's stories about large amounts of marijuana in their home. Apparently through Sandy's efforts, Mike Zaden met Spaw on October 12 in front of Damon's Rib Restaurant on Mall Road in Florence, and

gave to the agent the baggie of marijuana removed from the residence by Chris Sizemore. Although Zaden did not reveal the source of his information, Spaw verified Zaden's integrity as a prior source of reliable information. Analysis at the Kentucky State Police Crime Lab confirmed that the substance was marijuana. For approximately one month no further investigation was pursued because, in Spaw's opinion, Frank and Sandy Sizemore possessed no useable information and there were no other informants available to make a purchase.

In early November, 1987, Spaw received another call from Sandy Sizemore and shortly thereafter met her at the Ground Round Restaurant on Mall Road. She asked if her husband might contact Spaw regarding the Clutter matter, and on the evening of November 11, Kenton County dispatch contacted Spaw with Sizemore's phone number. In recalling their conversation, Spaw was quite sure that Frank Sizemore alone made plans for Spaw's entry into the Clutter residence because he (Sizemore) knew when both defendants were leaving for work. The agent had previously told Sizemore that he could not secure a search warrant without someone viewing the marijuana, and reiterated that Sizemore declined to serve either as an informant or to sign an affidavit. Spaw agreed that his November 11th meeting with Sandy Sizemore corrobrated information previously given by Zaden, with the exception that the substance had now been identified as marijuana.

Spaw drove to the Clutter residence that same night, knocked on the side door near the kitchen, and after showing the two boys his badge and identifying himself as a police officer, was admitted to the house. The smell of marijuana was immediately apparent as the boys led the officer to the defendants' bedroom. One of the boys pointed to a dresser drawer which Spaw opened and found several pounds of marijuana in bags. The boys indicated that additional pot was behind the dresser, and without moving that dresser Spaw looked behind it and found two large garbage bags filled with marijuana. He left the residence but took none of the contraband with him.

Based upon his observations, Spaw prepared an affidavit for issuance of a search warrant which was submitted to Campbell District Judge Neil Lewis on November 12. In order to protect the identiy of the Sizemore boys, Spaw drafted the affidavit with himself as the unnamed confidential informant and Agent Larry Berscheit as the affiant. The wording of that affidavit, challenged by defendants, reads: (Affiant's words in bold print)

> Affiant further states that on the date and at the time of **11/12/87 9:30** a.m. affiant received information from **a confidential and reliable informant, Hereafter referred to as C.I., who stated to the affiant that the C.I. was in the above described residence within the last 48 hours of 11/12/87 and while in the residence did observe a very large quantity of marihuana. The marihuana is bagged in clear plastic baggies and is kept in the bedroom. The C.I. is familiar with marihuana and C.I. has seen marihuana on numerous occasions and is familiar with the packaging methods for street sales.**
>
> Acting on the information received, affiant conducted the following independent investigation: **The affiant checked with Hal Spaw Director of the Narcotics Unit and Hal Spaw stated that he has received complaints on Mr. Clutter dealing in marihuana on at least two occasions.**
>
> Affiant believes his informant to be reliable and truthful because **The C.I. has supplied to the affiant on at least three (3) occasions in the last four (4) months to the whereabouts of Controlled substances including marihuana and on each occasion controlled substances were seized.**

In his testimony Spaw qualified the last paragraph by saying that on the occasions referred to in that section, the complaining people did not tell Spaw that they got marijuana from Clutter's residence.

LARRY BERSCHEIT

Berscheit works for the office of the Kentucky Attorney General and is assigned to the Northern Kentucky Narcotics Unit. He played no active role in this investigation and knew nothing of Spaw's conversations with Frank Sizemore. After discussing with Spaw ways in which to draft the contents of the affidavit in such a manner as to conceal the children's names, it was agreed that Berscheit would act as the affiant. He conceded that Spaw prepared the affidavit, but Berscheit read it in its entirety and verified that the contents were accurate. Although he accepted the fact that the affidavit misled the issuing judge to the extent that the affiant and confidential informant purportedly were two different people, Berscheit testified that the protection and safety of the children were paramount.

LAW

I. CONSENT SEARCH

It is undisputed that no exigent circumstances existed at the time of this search and the only justification for Spaw's initial warrantless search was consent. Therefore, the legality of this first search depends upon the consent given by the Sizemore children, and for them to have consented to the search they must have possessed common authority over the property being searched. In *United States* v. *Matlock*, 415 US 164, at 171, the term "common authority" is defined in this manner:

> . . . Mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his (or her) own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

The narrow issue to be decided is whether the two Sizemore boys possessed common authority over the defendants' bedroom, and the burden of proof in resolving that

issue rests with the government. *United States* v. *Selberg*, 630 F. 2d 1292 (8th Cir., 1980). When third party consent of minor children is relied upon for the search of another party's personal effects, it is important that close scrutiny be given to the Fourth Amendment issues implicated by that consent. The analysis must begin with *Matlock*.

In *Matlock*, the Supreme Court dealt with the scope of the third-party consent principle as it applies to joint tenants. A woman with whom the defendant was living consented to the search of the bedroom they jointly occupied, and the proceeds of a bank robbery were found in a diaper bag in the only closet in the room. The Court did not conclude that the couple's mutual use of the bedroom by itself justified her consent to the search. Rather the case was remanded for a specific finding as to whether the woman's relationship to the bedroom was sufficient tomake her consent valid against the defendant.

It is readily apparent that the Sizemore boys had no relationship to this bedroom, nor a substantial interest in it, nor control such as to give access to it. The agent did not attempt to search the common areas of this house, but instead went directly to perhaps the most private part of the residence and, without a warrant, opened the dresser drawer. There was no evidence at this hearing to support the conclusion that the two boys enjoyed either common authority over the bedroom or the contents of the drawer, express or implied, or the right to have access to the closed drawer. The defendants had an independent, reasonable expectation of privacy not only in their bedroom but in the furniture contents contained in that bedroom. The government presented no evidence that this recognizably private area was subject to the mutual use of the children, or that the children has a right to permit inspection on their own. If a mother had no authority to consent to a search of her son's bureau drawer, surely the converse is true that a child ought not have authority to permit a search of his mother's drawer. *Reeves* v. *Warden*, 346 F. 2d 915 (4th Cir., 1965).

The government cites *United States* v. *Miller*, 688 F. 2d 652

(9th Cir., 1982) as authority that minor children may consent to a search when they are customarily allowed to admit persons to a house in the absence of parents, or when they exercise sufficient control over the premises. *Miller* bears no resemblance to his case because it involved the outdoor and plan view discovery by a theft victim of his stolen trailer on the defendant's business premises. The defendant's 16-year old son was acting as his father's employee for purposes of consummating a sale. The Court in *Miller* suggested that in placing the stolen trailer on his property, Miller assumed the risk of its observation by someone invited onto his property by those who shared access to it. At 658-9. There can be no analogy to the privacy of one's bedroom.

In *Stoner* v. *California*, 376 US 483 (1964), the Supreme Court rules that a hotel guest is entitled to constitutional protection against unreasonable searches and seizures. A hotel clerk had no authority to permit a room search, nor did police have any basis to believe that the defendant had authorized the hotel clerk to permit that search. Significantly, the court commented that 'our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of apparent authority'. At 488.

Unfortunately, there is little appellate guidance on the narrow issue of a minor's consent to search his parents' home. (In view of the cohabitation relationship between the defendants, I am presuming Raymond Clutter to be "in loco parentis" for purposes of this report.) Consistent with the notion that the parents' interest in the premises is superior to that of the children, it would seem as a general proposition that under the *Matlock* common authority formula, it cannot be said that a child has authority equivalent to that of his parents to permit a full police search of the family home. That is to say, it cannot be said that the parents have assumed the risk of such an occurrence, for this is contrary to the common understanding of the parent-child relationship. 3 LaFave, *Search and Seizure*, § 8.4(b)(c). Two factors emphasized in this treatise were the age of the child and the scope of the consent

given. While evidence was presented that the children were routinely left alone, there was no evidence of third parties being routinely admitted to the house or of permission from the adult occupants to do so. The United States asserts the lack of evidence indicating that the boys were restricted in granting access, but where consent by a third party is the determining factor, the burden of proof upon the United States is affirmative, not negative. The second factor emphasizes what has already been stated; namely, there are degrees of privacy in various parts of a family home, and one's expectation of privacy in a bedroom should not be subject to the whims of a third party occupant.

Although Spaw removed nothing from the house on his first inspection, the marijuana seized pursuant to the search warrant on the second occasion cannot be introduced because the facts presented here do not meet the "indpendent source" doctrine discussed in the recent case of *Murray* v. *United States*, 108 S.Ct. 2529 (1988).

The conclusion that these two boys had no real or apparent authority to allow Spaw's search is indirectly supported by two opinions from the Sixth Circuit. *U.S.* v. *Alloway*, 397 Fed. 2d 105 (6th Cir. 1968); *McCravey* v. *Moore*, 476 Fed. 2d 281 (6th Cir. 1973). In both of these decisions involving a wife allowing officers to search a premises which was jointly occupied with the husband-defendant, the Sixth Circuit specifically pointed to the wife's equal right to access and occupancy of the premises, which rights were not enjoyed by the two Sizemore boys.

It is doubtful that these two boys on their own initiative would have contacted the police regarding the marijuana at their home. The seed was planted by Frank Sizemore and his children were acting at their father's behest. The question remains whether his actions arose out of antagonism toward the defendants or concern for his children's welfare. However, there seems to be no question but that the children served as a conduit for their father who had no authority regarding the Clutter residence. There was ample testimony regarding threats by the defendants to Frank Sizemore, and ill feelings

resulting from a bitter divorce. When all of the evidentiary facts are taken into consideration, the only reasonable conclusion is that no valid consent existed here. Just as Fourth Amendment rights may not be vicariously asserted, they may likewise not be vicariously waived.

II. AFFIDAVIT FOR SEARCH WARRANT

Relying upon *Franks* v. *Delaware*, 483 U.S. 154 (1978), defendants assert that this affidavit contained an intentional and material omission of fact which negated any informed decision by the issuing judge. The factual omission set out in their memorandum is the reference to Spaw as a confidential and reliable informant by the affiant, as well as a separate mention of a check with Spaw concerning complaints against Clutter. Defendants characterize this language as an intentional misstatement, but no evidence was procuded to support that contention. Judge Lewis may have reasonably believed that the confidential informant and Spaw were two separate persons, but that misconception was not crucial to establishing probable cause.

Under *Franks*, if the defendant makes a substantial preliminary showing that 1) a false statement was included in an affidavit supporting a search warrant, either knowingly or with reckless disregard for the truth and 2) the allegedly false statement is necessary to a finding of probable cause, then the false material in the affidavit is to be set aside. There has been no showing of any false statement by agent Berscheit and it is very evident that the language employed in this affidavit was for the sole purpose of protecting the identity of the children. The affidavit accurately and honestly reflected the facts as Berscheit understood them to be. Defendants have pointed to no language in this affidavit which is false or which was used to deceive the issuing judge as to the existence of probable cause. The source of the information was correctly represented to be a confidential informant who had seen the marijuana within 48 hours of requesting the search warrant. That statement was demonstrably accurate and did not

mislead the issuing judge. See *United States* v. *Calisto*, 838 F. 2d 711 (3rd Cir., 1988).

Cases cited by the defendants involved insertions of false names or deliberate misstatements of fact, none of which even arguably exists in this case. I can find no merit in the issues raised by defendants' second argument.

Based upon the invalid consent as discussed above, IT IS RECOMMENDED that the motion of the defendants to suppress marijuana and items seized from the residence at 40 Maple Avenue be GRANTED.

OBJECTIONS to this report and recommendation must be filed with the Clerk of Courts within ten (10) days of receipt. Failure to file objections within the specified time waives the right to appeal the district court's order. *U.S.* v. *Walters*, 638 F. 2d 947 (6th Cir., 1981).

DONE this 26 day of Aug., 1988.

/s/ J. GREGORY WEHRMAN
U. S. Magistrate

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-5390/5391

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RAYMOND CLUTTER (89-5390),
ANNA M. SIZEMORE (89-5301),
Defendants-Appellants.

Before: BOGGS and NORRIS, Circuit Judges; and EDWARDS, Senior Circuit Judge.

JUDGMENT
(Filed September 18, 1990)

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk
/s/ LEONARD GREEN
Clerk

Issued as Mandate: 11/13/90
COSTS: None

A True Copy.
Attest:
/s/ DIANE T. KUNTZ
(Ms.) Diane T. Kuntz, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-5390/91

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RAYMOND CLUTTER (89-5390),
ANNA MARIE SIZEMORE (89-5391),
Defendants-Appellants.

Before: BOGGS and NORRIS, Circuit Judges; and EDWARDS, Senior Circuit Judge.

ORDER

(Filed November 2, 1990)

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5(b) of this Court, we, R. Scott Croswell, III and Harry P. Hellings, Jr., members of the bar of this Court, hereby certify that on this _____ day of _____, 1990 three copies of the foregoing Petition for Certiorari were mailed, first class postage paid, to James E. Arehart, Assistant U.S. Attorney, P.O. Box 72, Covington, KY 41012, Counsel for Respondent. I further certify that all parties required to be served have been served. Petitioners address is 40 Maple Street, Highland Heights, Kentucky 41076.

_____

HARRY P. HELLINGS, JR.
Counsel for Petitioner Sizemore

_____

R. SCOTT CROSWELL, III
Counsel for Petitioner Clutter